

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





77 - 1329

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In The  
UNITED STATES COURT OF APPEALS  
For the Second Circuit

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UNITED STATES OF AMERICA,  
Appellee

v.

GORMANSTON WISHART,  
Defendant-Appellant

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On Appeal from  
The United States District Court  
for the  
Western District of New York

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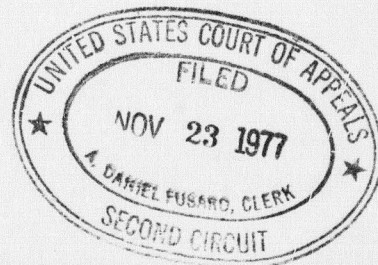
APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT TO REPLY BRIEF

A reply brief is the appropriate means of responding to the brief submitted by the government. In this case although the points raised by the government are in need of *some* answer, many of the points urged rather neatly fail to directly meet those raised by Appellant. It is the hope of counsel that by addressing these matters at present, the time spent in the scheduled oral argument will be of more assistance to the Court.



POINT I

THE GOVERNMENT MISCONSTRUES THE RULE  
THAT THE ELEMENTS OF THE LESSER OFFENSE  
MUST BE IDENTICAL TO SOME OF THE ELEMENTS  
OF THE GREATER OFFENSE.

The government urges that every violation of Title 8 U.S.C. §1324 does not include a lesser §1325 violation. True enough. But the government misstates the rule in arguing that, as a consequence, a §1325 violation, and conspiracy to commit that offense, may not be a lesser offense included within a §1325 violation, and conspiracy. See Government's Brief at p. 7-8.

The government's argument ignores the fact that every case decided on the point has been concerned with whether as charged and proven some of the elements of the greater offense constitute a lesser offense. E.g. *Berra v. U.S.*, 351 U.S. 134 (1956); *Sansone v. U.S.*, 380 U.S. 343 (1964). It is only within the context of the pleading and proof in a particular case that the rule on lesser included offense instructions make sense.

For example, not every attempt to evade or defeat tax (26 U.S.C. §7201) includes both or either a failure to file or pay (§7203) or a fraudulent return, etc., (§7207). But the case most relied on by the government clearly instructs that, nevertheless, "in an appropriate case" the lesser included offense doctrine applies to these statutes. *Sansone v. U.S.*, *supra*, at 349.

The government in its brief on this point conveniently and inappropriately avoids any reference to the pleading and proof in the instant case. But the government cannot and does not deny that some of the elements of Count I of the indictment, charging Conspiracy to violate §1324, on the pleading and proof, established all the elements of a Conspiracy to violate §1325, the lesser offense upon which an instruction was requested, and denied.

Nor does the government deny that the only difference between these two offenses on the proof was the element of "bringing," found in §1324 but not §1325, i.e. whether one of the objects of the Conspiracy was the actual bringing of Mr. Prashad into the United States.

When the requirement, that some of the elements of the greater offense charged include all the elements of a lesser offense requested, is properly stated, the government cannot deny that this requirement is met in the instant case.



POINT II

THE GOVERNMENT HAS MISSTATED THE RULE  
THAT THE LESSER OFFENSE NOT BE "COMPLETELY  
ENCOMPASSED BY THE GREATER.

Having argued, for the sake of one point, that the elements of the greater offense were completely different from the elements of the lesser requested offense, the government further argues, inconsistently, for the sake of another point (Government's Brief I B,C), that the undisputed proof applicable to the lesser offense was identical to that proof directed toward the greater offense.

The rule as stated in *Sansone, supra*, is that "the factual issues to be resolved by the jury" may not be "the same as to both the lesser and greater offenses."

In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. (380 U.S. at

The purpose of this rule is set forth in Note 6 to the Supreme Court opinion in *Sansone*:

This Court has long recognized that to hold otherwise would only invite the jury to pick between the felony and the misdemeanor so as to determine the punishment to be imposed, Congress has traditionally left through the judge.

The Supreme Court held that the proof in *Sansone* with respect to the violations of 26 U.S.C. §§7203 and 7207, "covered precisely the same ground" as the proof on §7201.

The Eighth Circuit has seen fit to simply state this particular prerequisite to the lesser included offense

instruction as follows:

The proof on the element or elements differentiating the two crimes is sufficiently and dispute so that the jury may consistently find the defendant innocent of a greater than guilty of the lesser included offense; (*U.S. v. Brischetto*, 538 F.2d 208, 209 (8th Cir. 1976).)

Accord., *U.S. v. Crutchfield*, 547 F.2d 496 (9th Cir. 1977);

*U.S. v. Whitaker*, 144 U.S. App. D.C. 344 (1971). As this

Court stated in *United States v. Harary*, 457 F.2d 471, at 478:

The proper case is one where "the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense. The jury is not given *carte blanche* to find the defendant guilty of only the lesser offense when such guilt necessarily establishes guilt of the greater offense." *Fuller v. United States*, 132 U.S. App. D.C. 264, 407 F.2d 1199, 1229 (1968) (*en banc*), cert. denied, 393 U.S. 1120, 89 S. Ct. 999 (1969).

When this requirement, hereinafter referred to as simply the "rational basis" requirement, is not satisfied then there is often, though not always, a correlative observation possible:

[i]f the court can conclude on the basis of the evidence presented that no reasonable man, weighing solely the evidence in light of the applicable law, could find the defendant guilty of the lesser offense and at the same time not guilty of the greater offense, *no disputed factual element could be present which would compel the court to give the lesser included offense instruction.* (*U.S. v. Harary, supra*, at 477), (added.)

The government now focuses on this correlative proposition, and urges this court to make it an additional



affirmative prerequisite to a lesser-included offense instruction that there be a "disputed factual element". The government is in error for several reasons.

A. The source of "disputed factual element":

*Sansone*. The Supreme Court in *Sansone* did not rule that there must be "disputed issue of fact" before giving a lesser included offense instruction. In fact, there was a disputed issue of fact: *Sansone* argued that, although he was willful in his failure to pay and his fraudulent return (26 U.S.C. §§7203, 7207), he was not "willful" within §7201. The Supreme Court agreed only in part:

the intent to report the income and pay the tax sometime in the future does not vitiate the willfulness required by §§7203, 7207, we cannot agree that it vitiates the willfulness requirement of §7201. (380 U.S. at 354).

The Supreme Court ruled in *Sansone* not that there were "no disputed issues of fact" but that because of its view of the law, there were no such issues "which would justify instructing the jury" that it could convict on the misdemeanors (§§7203, 7207) and not on the felony (§7201).

B. The presence of a "disputed factual element" is not a logical corollary to the presence of a rational choice for the jury between the lesser and greater offenses.

As noted, the absence of a disputed factual element may, although it might not, *viz.* *Sansone*, compliment the absence of a rational choice for the jury between the greater and lesser offenses; but the obverse is less likely to be true:

that is, even in the absence of an active "dispute" over the facts, the evidence offered by the government may be susceptible to more than one reasonable interpretation giving rise to a reasonable choice for the jury between two, a lesser and greater, offenses, e.g., *U.S. v. Crutchfield*, *supra*; *U.S. v. Comer*, 137 U.S. App. D.C. 214, 421 F.2d 1149, 1154 (1970); *Driscoll v. U.S.*, 356 F.2d 324, 327 (1st Cir. 1966).

Yet, in addition to the presence of a rational basis for such a choice by the jury, the government would have this court require, in addition, that the defendant come forward. The government complains that:

The defendant did not testify and no evidence was presented on his behalf. If Prashad did indeed take a bus across the border, the defendant could have offered evidence regarding the availability of bus transportation between Fort Erie and Buffalo during the hours in question. (Government's Brief, p. 11)\*

Yet, the government cannot require the defendant to trade his right not to testify or call witnesses for his right to a lesser-included offense instruction, if the "rational basis" requirement is satisfied. The government reports no authority requiring the defendant to affirmatively dispute the differentiating factual element between the

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\*The defendant did submit one exhibit which is in evidence, the letter from Prashad to the the defendant's wife, Defendant's Exhibit 1.



lesser and greater offenses, notwithstanding the satisfaction of the "rational basis" requirement.\*

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\*In fact, the government does not mention in this context (Point I B of its brief) the one case which makes the most affirmative analytic use of the "disputed factual element" notion -- *U.S. v. Harary, supra*. This is because, *Harary* was clearly decided on the "rational basis" requirement, 457 F.2d, at 478.

*Harary* is specifically directed toward the limitations on the prosecutor's entitlement to the lesser offense charged. In such a situation a slightly different analysis is in order: A defendant such as *Harary*, seeking to avoid a lesser-included offense instruction at the request of the prosecutor, has the opportunity to affirmatively, by stipulation or otherwise, remove factual disputes and avoid those inferences which would allow a "rational basis" for a lesser-offense verdict; by contrast the prosecutor cannot remove factual disputes or mitigating inferences once present in the record or raised by the defendant, except in the defendant's favor. Cf. *U.S. v. Crutchfield, supra*, at Note 4.

Some focus on the "no disputed issue of fact" aspect will assist the analysis in such a case as *Harary* by directing the attention of the court to whether the defendant has in fact opened or closed the door to the prosecutor's requested Lesser-included offense instruction.

POINT III

THERE IS A RATIONAL BASIS FOR AN  
ACQUITTAL ON THE GREATER OFFENSE  
BUT CONVICTION ON THE LESSER.

The cross-examination of Prashad concerning whether other means of entry into the U.S. were not in fact the object of the conspiracy, the statements by the defendant to Prashad (Appellant's Brief p. 4, 9), Prashad's mental instability as revealed in the letter to the Appellant's wife, and the impeachment of the truth of this testimony with the use of the same letter (Appellant's Brief, p. 2 at n.\*) were sufficient to allow the jury to rationally find against the defendant only those facts testified to by Prashad which were directly corroborated by other evidence; the jury could have reasonably inferred that Prashad actually entered the U.S. alone, with Wishart only risking one illegal border crossing, after retrieving Millers "landing slip", with just Prashad's clothes, not Prashad who does not resemble Miller as described in the immigration papers used (228). See *US. v. Driscoll*, 256 F.2d 324, at 328-29 (1966) (Evidence as to willfulness capable of more than one reasonable inference); *U.S. v. Crutchfield*, 547 F.2d 496, 501 (1977) ("Moreover, cross-examination of Agent Turner tended to impeach, contradict and explain Turner's testimony. This is sufficient to create a disputed factual element.")

However, the government argues that, even accepting this, the remaining proof still establishes the defendant's



guilt in a conspiracy aimed at "aiding and abetting Prashad's unlawful entry" (18 U.S.C. §2) or *attempting* to bring an alien into the country unlawfully (§1324), or on the basis of other theories, e.g. "masterminds a smuggling operation", all of which constitute greater offenses (Government's Brief, p. 12-13).

But, again, to make this argument that proof of the lesser offense in fact included the greater, the government completely disregards the limitations imposed by their own pleading and proof, in which not a hint of these theories of liability can be found. And, without the government's objection, the trial court correctly excised from its reading of §1324 to the jury any reference to the "attempt" language cited by the government (398). Thus, these arguments likewise have no pertinence to this appeal.

CONCLUSION

The government raises other arguments, in addition to those considered above, which are equally or more inappropriate to a determination of this appeal. Finally, characterizing counsel's argument for fair treatment of the defendant as an "obvious plea for sympathy," and quoting extensively from a summation designed to overcome the disadvantage complained of to this Court, the government completes its study in evasion and impertinence as a style of written advocacy.

Respectfully submitted,

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-vs-

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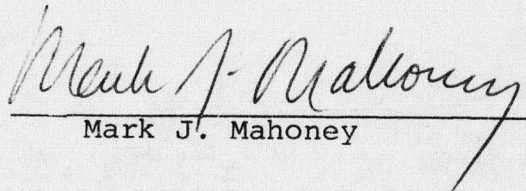
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STATE OF NEW YORK )  
COUNTY OF ERIE ) ss:  
CITY OF BUFFALO )

MARK J. MAHONEY affirms and states as follows:

On the 22nd day of November, 1977, your affiant served a copy of the Appellant's Reply Brief upon the United States Attorney for the Western District of New York by personally delivering same to Office of the United States Attorney, at Court Street, in Buffalo, New York.

The undersigned affirms the foregoing under penalty of perjury.

  
Mark J. Mahoney

Dated: *November 22, 1977*